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Intoxicating Liquors-Constitutional Law-Criminal Law-Double Jeopardy

INTOXICATING LIQUORS — CONSTITUTIONAL LAW — CRIMINAL LAW — DOUBLE JEOPARDY—This was a prosecution under sections 4 and 6, c. 48, Acts 1925, sections 2717, 2719, Burns Ann. St. 1926, by an affidavit in two counts, the first count charging that appellant and his wife, as to whom the action was later dismissed, did "unlawfully have in their possession intoxicating liquor," and the second count charging that at the same time and place they did "unlawfully and feloniously have in their possession, under their control and their use, a still and distilling apparatus for the unlawful manufacture of intoxicating liquor." Appellant, who was convicted on each count and on the first count was fined $100 and sentenced to 30 days in the Delaware county jail, and on the second count was fined $100 and sentenced to imprisonment of not less than one year nor more than five years in the Indiana State Prison, contends that "the same acts of the defendant constitute the offense charged in the two separate counts of the affidavit," and that only the first sentence imposed can be enforced. *Held*, that the contention is without merit. *Lawson v. State*, Supreme Court of Indiana, July 21, 1931, 177 N. E. 266.

The Fifth Amendment of the Federal Constitution provides "* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *" Article I, sec. 14 of the Indiana Constitution provides, "No person shall be put in jeopardy twice for the same offense * * *"

The provisions of the Federal Constitution, of course, protect the individual only against actions brought in the name of the federal sovereignty, and he must rely on the state Constitution for protection in the case of actions brought in the name of the state. In discussing the question, consideration may be given to two phases of the problem: (1) Acts which contravene the laws of the same sovereign; (2) Acts which contravene the laws of different sovereigns.

It is not a violation of a constitutional provision against double jeopardy on an indictment for particular offenses, when a defendant is found guilty of a lesser offense, secures a new trial, and then is found guilty of the greater offense. *Jones v. State*, 109 So. 265; *State v. Ash*, 122 Pac. 995; *Trono v. United States*, 199 U. S. 52. This seems to be the trend of modern decisions, altho the weight of authority is probably *contra*. *People v. McGinnis*, 234 Ill. 68. The matter has been covered by statute in some states. The fundamental principle that no person shall twice be put in

jeopardy for the same offense is everywhere recognized as a right of law and equity. *Whatley v. State*, 84 So. 860; *Rupert v. State*, 131 Pac. 713. This immunity from second jeopardy granted by the constitutions is a personal privilege, and the accused may waive it. *Blocher v. State*, 177 Ind. 356, 98 N. E. 118; *State v. White*, 71 Kan. 356, 80 Pac. 589. Such a waiver may be express or implied. *State v. White, supra.* An appeal by the accused operates is a waiver of the plea of former jeopardy on a second trial. *State v. Kessler*, 49 Pac. 293; *United States v. Ball*, 163 U. S. 662. The conflict of authority arises as to the extent of such waiver. *Wharton's Criminal Procedure*, 10th Ed. Vol. II, Sec. 1426 ff. The discharge of a jury in criminal case, because of their inability to agree on a verdict, after a protracted deliberation, does not entitle the defendant to his discharge on the ground that he has been once in jeopardy. *State v. Nelson*, 26 Ind. 366; *Shaffer v. State*, 27 Ind. 131. But when accused is put on trial on a valid indictment, before a legal jury, and the jury is discharged by the court, without good cause, and without the consent of the defendant, he has incurred the first peril, and the discharge of the jury is equivalent to a verdict of not guilty. *State v. Walker*, 26 Ind. 346. When a jury which is deliberating is taken into the public square by a bailiff, who there gives them a can of beer which he has procured from the defendant's saloon without knowledge of the court, the jury may be discharged over the defendant's objection, and this having been done, the defendant may be discharged as having been once in jeopardy. *State v. Leunig*, 42 Ind. 541. When a jury, in the course of its deliberations, discovers that one of the jurymen is not a resident of the county, and therefore disperses without giving notice to the court, or to any of the parties, and the court makes no effort to re-assemble them, the defendant is entitled to a discharge, having been once put in jeopardy. *Maden v. Emmons*, 83 Ind. 331. A defendant who by appeal or habeas corpus causes a second sentence to be imposed on himself will not be heard to claim having been twice in jeopardy. *Ex parte Bouchard*, 38 Cal. App. 441, 176 Pac. 692; *Commonwealth v. Murphey*, 174 Mass. 369, 54 N. E. 860. See 6 Ind. L. J. 576 (1931).

Punishment is customarily interpreted not to include payments exacted in civil proceedings. Even though the act be a crime, imposition of compensatory damages is apparently unquestioned under the theory that this is a mere reparation to the injured individual. Some courts, however, refuse to allow punitive damages as well, arguing that the amount in excess of the plaintiff's loss is demanded for injury to the state. *Wabash Printing and Publishing Co. v. Crumrine*, 123 Ind. 89, 21 N. E. 904; *Shufakiss v. Duray*, 85 Ind. App. 426, 154 N. E. 289. Most courts do not recognize this distinction. *Bundy v. Maginess*, 76 Cal. 352; *Hauser v. Griffith*, 102 Iowa 215, 71 N. W. 223; *Wersing v. Smith*, 222 Pa. 8, 70 Atl. 906; *Luther v. Shaw*, 157 Wis. 234, 147 N. W. 18. Under another view, the state, as plaintiff, may collect a penalty after punishment by fine and imprisonment, where the three are provided by statute. *People v. Snyder*, 90 App. Div. 422, 86 N. Y. S. 415. The federal courts do not allow two personal actions, *United States v. Choteau*, 102 U. S. 603; *United States v. Ulrice*, 102 U. S. 612; but permit a proceeding *in rem* for a forfeiture after conviction (an acquittal is conclusive against the government, *Coffey v. United*

States, 116 U. S. 436, 6 Sup. Ct. 437) for the crime. *United States v. Three Copper Stills*, 47 Fed. 495.

The legislature may make one act a number of crimes, but does not have the power to call the very same facts by different names and create separate offenses. *State v. Speedling*, 183 N. W. 310. The prosecutor must elect on which charge he will rely if the offenses are the same within the constitutional prohibition. *Savage v. State*, 92 So. 19; *Newton v. Commonwealth*, 249 S. W. 1017. The test is whether or not proof of the requisites to support either offense contains proof of all facts necessary to convict of the other. *Morey v. Commonwealth*, 108 Mass. 433. If not, both may be punished. Thus, there is no question of the power to make repetitions of an act on one occasion separate offenses. *Eberling v. Morgan*, 237 U. S. 625, 35 Sup. Ct. 710. But frequently in construing the statute, the courts find that only one offense has been committed. *United States v. Adams*, 281 U. S. 202; *Jackson v. State*, 14 Ind. 327. It may also mark off one section of a transaction as one offense, and the acts following as another, though the latter be the object, but not the necessary result, for which the first was committed. *Morgan v. Devine*, 237 U. S. 632. Or, the offenses, though concurrent, may be distinct, if an additional fact must be proved to convict of each, which is not required in proof of the other. *Albrecht v. United States*, 47 Sup. Ct. 250. A conviction on two such charges does not result in double punishment because the offenses are separate and distinct. *Thompson v. State*, 89 Ind. App. 555, 167 N. E. 345. *Woodworth v. State*, 185 Ind. 582, 114 N. E. 86; *State v. Graham*, 73 Iowa, 553, 35 N. W. 628; *Commonwealth v. McCabe*, 163 Mass. 98, 39 N. E. 777. Where one of such offenses is a misdemeanor and the other a felony, and upon trial the defendant is convicted of both, he has not been twice placed in jeopardy for the same offense. *Pivak v. State*, 202 Ind. —, 175 N. E. 278. Different crimes of the same character growing out of the same transaction may be joined in separate counts of the same affidavit. *Campbell v. State*, 197 Ind. 112, 149 N. E. 903; *Rvkvic v. State*, 194 Ind. 450, 143 N. E. 357; *Glover v. State*, 109 Ind. 391, 10 N. E. 282. However, some courts hold that a common essential ingredient established identity. *State v. Mowser*, 106 Atl. 416. A few cases impose the requirement that every necessary fact must be common to both charges for the second to be barred. *Schultz v. Biddle*, 19 Fed. (2d) 478; *People v. Nelson*, 319 Ill. 386, 150 N. E. 249. A conviction for assault does not bar prosecution for manslaughter where the victim died after the first judgment. *Diaz v. United States*, 223 U. S. 442. A suit for an injunction against the violation of a statute and punishment for contempt of such injunction, in addition to a criminal prosecution for the illegal act, do not violate the constitutional provision against putting a person twice in jeopardy. *State ex rel. Duensing v. Roby*, 142 Ind. 168.

As a second consideration, an act which contravenes the law of different sovereigns may be recognized in the courts of each as a distinct offense. *Hebert v. Louisiana*, 272 U. S. 312; *United States v. Lanza*, 260 U. S. 377. So, in transporting liquor across several states, a person may be liable on a charge of transportation in any of the several states crossed, and by the federal government.

By asserted analogy, conduct violating a state statute and a city ordinance may be the basis of two prosecutions. *Hughes v. People*, 9 Pac.

50; *Robbins v. State*, 95 Ill. 175; *State v. Lee*, 13 N. W. 913. The analogy cannot be supported, however, where the city governments are the creations of the legislature, as was decided in *McInerny* v. City of Denver, 17 Colo. 302, 29 Pac. 516, and in *Ogden v. City of Madison*, 87 N. W. 568. (Where the court reached the amazing decision that the offense against the city being distinct from that against the state, as perpetrated against a different sovereignty, the constitutional rights guaranteed to a violator of a state law did not extend to a prosecution for violation of a city ordinance.) However, the rule allowing two punishments under ordinance and statute seems firmly established. *State v. Tucker*, 242 Pac. 363, (the court, being confronted with the question for the first time, expressed doubt as to the soundness of the rule, but followed it as the weight of authority.) In some cases upholding this doctrine the Indiana case of *Levy v. State*, 6 Ind. 281, is cited as an authority; the case, however, is not in point, the legislature having empowered city councils to pass ordinances providing for a penalty to be secured in a civil action, and this was held to be no bar to a criminal prosecution for the same act under a criminal statute. The doctrine has never been accepted by the federal government. *Grafton v. United States*, 206 U. S. 333, 27 Sup. Ct. 749, (holding conviction under a Philippine law was a bar to prosecution under a federal statute.) Some states refuse to allow its application. *Dowling v. City of Troy*, 173 Ala. 468, 56 So. 118; *Richardson v. State*, 56 Ark. 367, 19 S. W. 1052; *Respass v. Commonwealth*, 107 Ky. 139, 53 S. W. 24; *White v. Commonwealth*, 122 Ky. 408, 92 S. W. 285; *Ex parte Freeland*, 38 Tex. Cr. R. 359, 42 S. W. 295; Davis v. State, 37 Tex. Cr. R. 359, 38 S. W. 616, 39 S. W. 937; *Morganstern v. Commonwealth*, 94 Va. 787, 26 S. E. 402.

The doctrine of the principal case of allowing separate actions on separate phases of the same transaction seems firmly intrenched by the authorities cited above, and seems to be correct in principle. *Quaere*: Could this doctrine subject a defendant, because of one transaction, to the working of one of the habitual criminal statutes, or to increased penalties for second offenders?

L. H. W.